DEB BRATA DAS GUPTA

v.

KNIGHT FRANK & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING MOTIONS NO: R1-25-102-2001]
29 AUGUST 2005

ARBITRATION: *Award - Setting aside - Application for - Whether arbitrator misconstrued a clause in agreement - Whether arbitrator acted in excess of jurisdiction - Whether there was error on face of the award - Whether application dismissed*

The respondents herein entered into a management agreement with Gupta and Boyd, a partnership firm registered in Malaysia. At the time of the agreement, the partners of Gupta and Boyd were D.B Das Gupta (applicant) and one Christopher Boyd (Boyd). The management agreement provided, *inter alia*, that in consideration of the respondents granting licenses for use of their name and providing management services to Gupta and Boyd, the latter agreed to pay the respondents an annual management fee. However, by a letter dated 17 March 1995, the respondents terminated the licences under cl. 19(e)(ii) of the management agreement after Boyd resigned and ceased to be a partner. The applicant disputed the right of the respondents to terminate the licences under the said clause. The dispute between the parties were referred to a sole arbitrator and on 27 August 2001, the arbitrator delivered the award and declared that the respondents' termination notice was valid in law and effective to terminate the licence and ordered the applicant to pay the respondents annual management fees due for the years ended 28 February 1995 and 29 February 1996. By way of an originating motion dated 5 October 2001, the applicant sought from this court for the award by the arbitrator ('the award') be set aside pursuant to s. 24 of the Arbitration Act 1952 (the Act). The issues that arose were: (1) whether the arbitrator had misconstrued cl. 5(h) of the management agreement; and (2) whether the arbitrator had acted in excess of his jurisdiction and was wrong in law in making his decision on the quantum of management fees without strict proof.

Held (dismissing the applicant's application):

[1] Clause 5(h) of the management agreement reads 'that it shall not without cause and excuse or express right given by this agreement terminate the licence and management services herein agreed to be granted and provided by it.' It was the applicant's contention that the word 'or' in the said clause should be read conjunctively. The arbitrator had expressed his views on the issue by determining that cl. 5(h) must be constituted in its natural and ordinary meaning and that the word 'or' in that clause must be construed disjunctively. The arbitrator's interpretation of cl. 5(h) was faultless. He had given sound reasons for arriving at his conclusion. However, even on the assumption that arbitrator did err in his interpretation of the clause, this court was not entitled to set aside the award merely because it may take a different view on the interpretation of a document. There was no merit on the first issue raised by the applicant. (pp 435 f-g & 436 c, f)

[2] The findings made by the arbitrator regarding the quantum of management fees were finding of facts before him at the arbitration proceedings. This court does not 'wear the mantle' of an appellate court in this proceedings and it was not open for the court to reopen an award of arbitration purely on the suggestion that there has been a wrong assessment of evidence by the arbitrator. Here, the arbitrator had scrutinized the evidence of both parties and made a reasonable determination. It was not the task of this court to scrutinize every piece of evidence adduced before the arbitrator and make another finding of fact. Accordingly there was no merit on the applicant's second ground to set aside the award. (p 438 a-b)

[3] The applicant had further contended as an additional issue that there was error on the face of the award in that the arbitrator at p. 15 of his award determined that the management fee payable by the applicant to the respondents to be RM228,079 but at para.iii and iv of p. 16 and 17 of the award he had referred the sum to be RM264,758.06. The court was of the view that the sum stipulated RM264,758.06 as management fee payable by the applicant to the respondents was a clerical error. The right sum was RM228,079 as determined by the arbitrator. The above clerical error clearly does not amount to an error of law on the face of the award which warrants setting aside the award. (p 438 e & g)

[4] The applicant did not possess tenable grounds recognized by established legal principles in support of its application to have the award referred for the arbitrator's reconsideration or to have the award set aside for the arbitrator's misconduct of the proceeding or on the basis of error of law on the face of the award. (p 439 a)

Case(s) referred to:
Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd [2003] 1 CLJ 103 CA ***(refd)***
Hartela Constractors Ltd v. Hartecon JV Sdn Bhd [1999] 2 CLJ 788 CA ***(refd)***
Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***
Prithipal Singh v. Dato' Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener) [1993] 4 CLJ 107 SC ***(refd)***
Syarikat Pemborong Pertanian v. Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***
Union of India v. Rallia Ram [1963] AIR SC 1685 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 18, 23, 24
Federal Capital Act 1960, s. 4(7)

Other source(s) referred to:
Halsbury's Laws of England, vol 2, 4th edn, para 623

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:
By way of an originating motion dated 5 October 2001, the applicant is seeking from this court for the following relief:

(i) that the award made on 27 October 2001 (the award) by the learned arbitrator, in an arbitration between the applicant and the respondents be set aside pursuant to s. 24 of the Arbitration Act 1952 (the Act);

(ii) alternatively, that the award be remitted for the reconsideration of a different arbitrator pursuant to s. 23 of the Act.

The factual background giving rise to this applicant are as follows.

On 23 July 1986, the respondents entered into a management agreement with Gupta and Boyd, a partnership firm registered in Malaysia. At the time of the agreement, the partners of Gupta and Boyd were D.B. Das Gupta (applicant) and one Christopher Boyd (Boyd). They were partners of Gupta and Boyd by virtue of a partnership agreement dated 23 April 1986.

The management agreement provided *inter alia*, that in consideration of the respondents granting licences for use of their name (insignias) and providing management services to Gupta & Boyd, the latter agreed to pay the respondents an annual management fee equal to a prescribed percentage of Gupta & Boyd's audited gross annual turnover. Their business relationship commenced on 1 March 1986.

However, by a letter dated 17 March 1995 the respondents terminated the licences under cl. 19(e) (ii) of the management agreement after Boyd resigned and ceased to be a partner of Gupta & Boyd. Boyd resigned and ceased to be a partner of Gupta & Boyd on 1 March 1995.

The applicant disputed the right of the respondents to terminate the licenses under the said clause.

The disputes between the parties were referred to a sole arbitrator in the name of Dato Param Cumaraswary. The issues before the learned arbitrator essentially revolve around the respondents' entitlement to terminate the licenses granted by the respondents in favour of Gupta & Boyd and the management fees and general damages for and in connection with the issue of termination.

On 27 August 2001, the learned arbitrator delivered the award where he declared as follows:

(i) that the respondents' termination notice served on the applicant on 18 May 1995 was valid in law and effective to terminate the licence;

(ii) that from 17 June 1995 until 20 January 1997 the applicant was in breach of cl. 21 of the management agreement;

(iii) the applicant to pay the respondents the sum of RM264,758.06 and RM34,208.93 as annual management fees due for the years ended 28 February 1995 and 29 February 1996 respectively;

(iv) the applicant to pay the respondents interest at the rate of 4% on RM264,758.06 from 1 August 1995 until date of this award and on RM34,208.93 from 19 May 1991 until the date of this award; and

(v) the costs of the arbitrator to be taxed and paid by the applicant to the respondents.

Arising from the above award is this application by the applicant. Before me, the learned counsel for the applicant raised two main issues for consideration and determination of this court:

(i) whether the learned arbitrator has misconstrued cl. 5(h) of the management agreement; and

(ii) whether the learned arbitrator has acted in excess of his jurisdiction and is wrong in law in making his decision on the quantum of management fees without strict proof.

Before addressing the above issues, it is perhaps useful to set out the parameters of the court's jurisdiction when called to interfere with an arbitration's award. It has often be said that the jurisdiction to remit an award for reconsideration or to have it set aside is one which must be exercised with utmost care and deliberation. Richard Malanjun JCA (now Federal Court Judge) when delivering the judgment of the Court of Appeal in the case of *Future Heritage Sdn. Bhd. v. Intelek Timur Sdn. Bhd.* [2003] 1 CLJ 103 stated it as follows:

> … the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pte. Ltd. v. Union of India* [1989] AIR SC 777 at p. 780:
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> > When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on the merits.

In the case of *Hartela Contractors Ltd. v. Hartecon J.V. Sdn. Bhd.* [1999] 2 CLJ 788, Gopal Sri Ram JCA stated the same but in the following words:

> So jealously did the common law guard against curial inference with private arbitrations that it was most reluctant to create exceptions to the general rule …
>
> In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statue is one that show be exercised with great show be exercise with great care and responsibility.

A further limited exception which enable the court to set aside an award is where the arbitrator has misconducted himself or the proceedings. The term misconduct has been defined by Raja Azlan Shah J (as he then was) in the case of *Syarikat Pemborong Pertanian v. Federal land Development Authority* [1971] 2 MLJ 210 as being the following:

> In the law of arbitration, misconduct is used in a technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias and partiality. It includes any irregularity of action which is not covenant with the general principle of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct. It's only when the evidence is material, relevant and had gone to effect the award that the award will be vitiated. …the plaintiff's complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

A further principle is that the arbitrator is the sole judge of findings of fact and whether he drew wrong inference of fact from the evidence itself is not sufficient as a ground to warrant setting aside the award. The Federal Court on *Intelek Timur Sdn. Bhd. v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743 held as follows:

> As such, if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant setting aside of his award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood" per Raja Azlan Shah J (as he then was) in *Syarikat Pemborong Pertanian & Perumahan v. Federal Law Development* [1971] 2 MLJ 210.

It is also trite law that when dealing with the award of an arbitrator, the court is not rehearing the matter. An award is not to function as an appeal of the case on the merits. This principles was enunciated by Gopal Sri Ram JCA in the case of *Hartela* in which his Lordship cited the case of *Union of India v Rallia Ram* [1963] AIR SC 1685 which reads as follows:

> The award in the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

With the above principles in mind, I will now proceed to address the two grounds advanced by the applicant for consideration and determination by this court.

(i) Whether The Learned Arbitrator Has Misconstrued Clause 5(h) Of The Management Agreement

The respondents contended that they have an express right under cl. 19(e)(ii) of the management agreement to terminate the licences and management services. Clause 19(e)(ii) provides as follows:

> 19. KFR may, by notice to Gupta, terminate the said Licenses ifhereafter any of the following events occurs:
>
> (e) If either Mr. Gupta or Mr. Boyd
>
> (ii) before his normal retirement age, i.e. 55 years, retires (whether) because of any circumstance referred to in sub-paragraph (i) above or for any other reason) from being engaged full time in the said business of Gupta, or ceases to be a partner in Gupta, or (if Gupta has been reconstituted as a company) fails to become or ceases to be a director of and shareholder in Gupta.

According to the respondents they terminated the licences because Boyd resigned and ceased to be a partner of Gupta & Boyd on 1 March 1995.

However, the applicant contended that the respondents are bound by the provision of cl. 5(h) of the management agreement if they are to invoke cl. 19(e)(ii) properly. According to the applicant under cl. 5(h) there is an overriding requirement that the termination shall be with just cause and excuse and shall not be tainted with *mala fide.*

Clause 5(h) of the management agreement reads as follows:

> KFR and Bresea each severally undertakes and covenants to Gupta as follows:
>
> (h) that it shall not without cause and excuse or express right given by this agreement terminates the licence and management services herein agreed to be granted and provided by it. (emphasis added).

Thus, the applicant contended that the word 'or' in cl. 5(h) of the management agreement should be read conjunctively. The case of *Prithipal Singh v. Dato Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn. Bhd., Intervener)* [1993] 4 CLJ 107 was relied upon to support the applicant's preposition. In that case the Supreme Court was dealing with s. 4(7) of the Federal Capital Act 1960 which reads as follows:

> where the Commissioner is prevented from carrying out his functions, …, the Secretary General of the Ministry of the Federal Territory, **or** such other public officer as … (emphasis added).

The then Supreme Court held the significance of the comma cannot be ignored because without the comma, the words 'Secretary General' and 'public officer' must be read conjunctively, but with the comma, these words must be read disjunctively. Thus, it was argued on behalf of the applicant that since in cl. 5(h) of the management agreement, there is no comma after the words 'without just cause and excuse' and before the word "or" therefore applying the principle in *Prithipal Singh* the words or must be read conjunctively.

On this issue the learned arbitrator expressed his views as follows:

> I am of the view, and I determine so, that clause 5(h) must be constituted in its natural and ordinary meaning. The word 'or' in that clause must be construed disjunctively. To do otherwise would do violence to the word 'or' in its context as said in the High Court and approved by the Court of Appeal in *Union Insurance (M) Sdn Bhd v. Chan You Young* [1999] 1 MLJ 593. The clause gave the respondents the option to terminate the licence and management service either when there was just cause and excuse or upon reliance on express contractual right to terminate. In other words the respondents could terminate the licence and management services when:
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> a) anyone of the specific contractual events entitling the respondent to terminate had accrued; or
>
> b) the respondents otherwise has some just cause and excuse.

To me, the learned arbitrator's interpretation of cl. 5 (h) is faultless. He gave sound reasons for arriving at his conclusion. But quite apart from the reasons of the learned arbitrator on this issue, even on the assumption that the learned arbitrator did err in his interpretation of the clause this court is not entitled to set aside the award merely because it may take a different view on the interpretation of a document. The Court of Appeal in *Future Heritage* quoted an extract from *Halbury's Laws of England*, Vol. 2 (4th edn at para 623) as follows:

> … and where the question referred for arbitration is a question of construction which is generally a question of law the arbitrator's decision cannot be set aside only because the court itself would have come to a deferent conclusion, but it appears on the face of the award that the arbitrator has proceeded illegally, as for instance by deciding on evidence which was inadmissible or on principle of construction which the law does not countenance, there is an error of law which may be ground for setting aside the award.

To me, the learned arbitrator has neither made any decision on inadmissible evidence nor applied principles of construction which are unacceptable in law. Accordingly, I find there is no merit on the first issue raised by the applicant.

(ii) Whether The Learned Arbitrator Has Acted In Excess Of His Jurisdiction And Is Wrong In Law In Making His Decision On The Question Of Management Fees Without Strict Proof

In order to understand the argument of the applicant, it is necessary to examine what was decided by the learned arbitrator with regard to management fee payable by the applicant to the respondents. The learned arbitrator held as follows:

> Having considered the evidence and the submission, I am satisfied and so determine, that the respondents had provided the management services within the parameters of the management agreement and the applicant had the use of the licences and as such they are entitled to the outstanding management fees up to the date of termination with regard to the management fee for the year ended 28 February 1995, the audited report for the year provide as an administration expense item a sum of RM 228,079.00 as management fee for that year. Through he respondent submitted for a higher figure yet they concluded to accepting this figure as an admitted figure.
>
> > I therefore, determine that the management fee payable by the claimant to the respondent for that year to be RM228,079.00.
>
> With regard to the management fee for the period between 1 March 1995 to 18 May 1995 (the date of termination of the licence) rather than divert accounts to be take of the actual turnover for that short period it is fair to apportion the turnover for the whole of that financial year. It was in evidence before me that the turnover for the period ended February 1996 was RM2,592,228.00. The apportionment of this figure for the 69 days excluding the day of termination would be taken to be 69/366 then of RM2,592,228.00. That would be RM488,699.00. Therefore I find, and so determine, that the management fee of 7% payable for the period would be RM34,208.93.

The applicant contended that the sum of RM228,079 as the management fee arrived at by the learned arbitrator was based on an unsigned accounts in draft form. With regard to the management fee for the period from 1 March 1995 and 18 May 1995 (69) days the applicant contended that the learned arbitrator accepted uncritically as correct that the turnover for the period ending 29 February 1996 was RM 2,592,288 and apportioned the turnover for 69 days as RM 488,699. To the applicant, the award on management fees was flawed as the respondents have not strictly proven the question of the management fees as claimed by the respondents in the counter claim. Further, according to the applicant that the auditors who prepared the account were not called to give evidence.

With respect, I am unable to agree with the applicant. To me, the findings made by the learned arbitrator are findings of fact before him at the arbitration proceedings. This court does not "wear the mantle" of an appellate court in this proceedings and that it is not open for the court to reopen an award of arbitration purely on the suggestion that there has been a wrong assessment of evidence by the learned arbitrator.

To me, the learned arbitrator had scrutinized the evidence of both parties and made a reasonable determination. It is not the task of this court to scrutinize every piece of evidence adduced before the learned arbitrator and make another finding of fact. Accordingly, I find no merit on the applicant's second ground to set-aside the award.

The applicant further contended as an additional issue that there is error on the face of the Award in that the learned arbitrator at p. 15 of his award determined that the management fee payable by the applicant to the respondents to be RM228,079. But at para. (iii) and (iv) of p. 16 and 17 of the award, the learned arbitrator referred the sum to be RM264,758.06.

Looking at the award as a whole, I am of the view that the sum stipulated RM264,758.06 as management fee payable by the applicant to the respondents is a clerical error. The right sum is RM 228,079 as determine by the learned arbitrator. In fact the clerical mistake was admitted by the learned arbitrator in response to the letter of the respondents' solicitor dated 3 October 2001, pointing to the clerical error. In the letter dated 9 October 2000 the learned Arbitrator stated as follows:

> In light of the reasons I gave in page 15 for the award of RM228,079.00 as management fee for the year and that 28 February 1995 instead of the sum of RM264,758.06 claimed by the respondent the figure RM264,758.06 stated in paragraph (iii) and (iv) in page 16 and 17 of the award should read RM228,079.00.

I am of the view the above clerical error clearly does not amount to an error of law on the face of the award which warrants setting aside the award. Section 18 of the Act can be relied upon to correct the error. It reads as follows:

> Unless a contrary intention is express in the arbitration agreement, the arbitrator or umpire shall have the power to convert in an award any clerical mistake or error from an accidental slip or omission.

In conclusion, I am of the view that the applicant does not possess tenable grounds recognized by established legal principles in support of its application to have the award referred for the learned arbitrator's reconsideration or to have the award set aside for the arbitrator's misconduct of the proceeding or on the basis of errors of law on the face of the award.

For the above reasons, I had on 17 May 2005 dismissed the applicant's application with costs and made a further order that the award be remitted to the learned arbitrator to correct the clerical error as stated above.